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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho, and TOM D. McELDOWNEY, Director of the Department of Finance of the State of Idaho,

Appellants,

v.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit

MOTION TO AFFIRM

IVAN IRWIN, JR.,
A. B. CONANT, JR.,
3100 First National Bank Building,
Dallas, Texas 75202,
Attorneys for Appellee.

Of Counsel:
SHANK, IRWIN, CONANT, WILLIAMSON & GREVELLE
3100 First National Bank Building
Dallas, Texas 75202
JAMES WM. MOORE
Yale University
New Haven, Connecticut

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MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground that the issues were

correctly resolved and do not warrant further argument or review.

QUESTIONS PRESENTED

1. Can a United States District Court sitting in Texas obtain personal jurisdiction of an Idaho official who has attempted to enforce, extraterritorially, a state statute which intentionally affects Texas residents in Texas?

2. Is venue proper in a United States District Court in Texas for a suit against an Idaho official who is alleged to have enforced an unconstitutional statute in violation of the Securities and Exchange Act of 1934?

3. Is the Idaho Corporate Takeover Statute (Idaho Code §§30-1501, et seq.) unconstitutional because it regulates activity in a field preempted by the federal Williams Act?

4. Does the Idaho Corporate Takeover Statute effect an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution?

STATEMENT

This is an appeal from the final judgment and decree entered on August 10, 1978 by the United States Court of Appeals for the Fifth Circuit (577 F. 2d 1256) affirming the judgment entered on September 6, 1977 by the United States District Court for the Northern District of Texas, Dallas Division (439 F. Supp. 420).

The District Court found it had personal jurisdiction of the Idaho defendants and venue was proper in the Northern District of Texas. That court entered judgment declaring unconstitutional and restraining the enforcement

of the Idaho Corporate Takeover Statute[1] ("Idaho Takeover Statute") insofar as it purported to apply to a proposed interstate cash tender offer by Great Western United Corporation ("GWU") for the purchase of securities of Sunshine Mining Company ("Sunshine").

I. PROPOSED TENDER OFFER

On March 21, 1977, GWU announced its intention to make a tender offer to purchase up to two million shares of Sunshine, subject to the terms and conditions set forth in a proposed form of an Offer to Purchase and related Letter of Transmittal filed by GWU with the Securities and Exchange Commission pursuant to 15 U.S.C. §§78m(d)-(e) (the "Williams Act"). The Honorable Marion Callister, United States District Judge for the District of Idaho, held in the course of litigation related to the present case that GWU was in compliance with the requirements of the Williams Act, which regulates interstate tender offers.[2]

II. ADMINISTRATIVE PROCEEDINGS

On March 21, 1977, GWU filed various documents with the Commissioner of Finance of the State of Idaho in compliance with the Idaho Takeover Statute. On March 25, 1977, Appellant McEldowney, with no notice to GWU, without hearing, and without posting bond or other security, issued an

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[1] Idaho Code §§30-1501, *et. seq.*

[2] *Sunshine Mining Co. v. Great Western United Corp.* (1977-1978 Transfer Binder) Fed. Sec. L. Rep. (CCH) §96049. In that related case brought against GWU by Sunshine in an attempt to block the proposed tender offer, the District Court in Idaho denied injunctive relief and specifically found that there were no material omissions in GWU's filings with the SEC. That litigation was dismissed as a result of settlement between the parties on October 5, 1977.

order that effectively enjoined GWU's proposed interstate cash tender offer for more than five months.

During this incipient stage of the proposed tender offer by GWU for shares of Sunshine, it was indicated that the States of Maryland and New York,[3] in addition to the State of Idaho, would assert jurisdiction over the proposed offer. Representatives of GWU sought definitive directions from officials of those two states, but were left uncertain as to whether compliance would be required. Because of this uncertainty and the inconsistencies between the various state acts, when this suit was instituted, Maryland and New York officials were joined as party defendants. For reasons detailed later, the only parties defendant remaining in the case after final judgment by the District Court were Wayne L. Kidwell, Attorney General of Idaho, who chose not to appeal from Judge Hill's Judgment, and Tom D. McEldowney, Director of the Idaho Department of Finance, the Appellant herein.

Because Kidwell was not a party to the appellate proceedings below, GWU has moved this Court to dismiss him as a party to the proceedings before this Court.

III. PROCEEDINGS AND OPINION BELOW

On March 28, 1977, GWU filed its Complaint against the representatives of the States of Maryland, New York and Idaho (including Appellants) who are charged with the responsibility of enforcing the state takeover statutes of those States. The action was commenced in the United States District Court for the Northern District of

[3] Sunshine's wholly owned subsidiary, Anchor Post Products, Inc. has manufacturing facilities based in Maryland and Sunshine conducts business in New York. Therefore, the takeover statutes of those states were arguably applicable to GWU's offer.

Texas. The Complaint alleged, in substance, that GWU was aggrieved by acts and threatened acts of the Appellants and the other Defendants directed against GWU and that such acts were unconstitutional. GWU sought a declaratory judgment that the state takeover statutes, insofar as they purport to apply to an interstate cash tender offer for the purchase of securities traded on a national securities market (a) represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, (b) intruded without warrant into an area preempted by federal regulation in contravention of the Supremacy Clause of the United States Constitution and (c) denied rights of equal protection of the law and due process of the law guaranteed by the Fourteenth Amendment to the United States Constitution and the Civil Rights Act.

On March 30, 1977, counsel for Appellants and the other Defendants appeared specially and moved to dismiss the action as to them by challenge to jurisdiction and venue. At the hearing, argument was heard on the issues of jurisdiction and venue, as well as on issues going to the merits of GWU's Application for a Preliminary Injunction. The District Court took judicial notice of the Williams Act and of the state takeover statutes. Counsel for Appellant McEldowney advised the District Court o nthe record that he was seeking to apply the provisions of the Idaho Act extraterritorially, so as to prohibit GWU's proposed tender offer from going forward in any State until and unless the requirements of the Idaho Takeover Statute were satisfied.

Following the hearing, the District Court entered a Temporary Restraining Order finding that immediate and irreparable injury, loss or damage would result to GWU unless Defendants were forthwith restrained as prayed in the Com-

plaint. The court found that GWU would be deprived of its right under the federal law to make its proposed cash tender offer, would be subjected to conflicting laws, would be subjected to delays which disrupt the orderly trading of its securities and those of Sunshine on national securities markets, and might be denied the advantages of the uniform national system of regulation in making its interstate cash tender offer.

Appellants thereupon filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit and moved for a stay of the Temporary Restraining Order and for expedited appeal. Following a hearing on April 5, 1977, the Circuit Court issued an Order staying the Order of the District Court pending further proceedings in the District Court, directing the District Court to consider the issues of jurisdiction and venue and enter Findings of Fact and Conclusion of Law thereon before consideration of the merits, and directing the District Court, should it determine that it had jurisdiction and venue, to consider certification of the determination under 28 U.S.C. §1292 (b) before trial on the merits.

The District Court on April 8, 1977, held a full evidentiary hearing on the issues of jurisdiction and venue. On April 21, 1977, the District Court filed its Findings of Fact and Conclusions of Law, finding that no case or controversy existed with respect to Maryland, but finding that a case or controversy did exist with respect to both the New York and Idaho Defendants, and further finding that jurisdiction and venue over the New York and Idaho Defendants were proper in the Northern District of Texas. The Maryland defendant was dismissed from the case. The Trial Court denied an interlocutory appeal and declined certification for the reasons given in its Order. The court postponed

the hearing on the merits until May 6, 1977, because of the Defendants' expressed intention to attempt to mandamus an interlocutory appeal. The Fifth Circuit ultimately denied the interlocutory appeal and the request by Defendants for a writ of mandamus.

On May 23 and May 24, 1977, a hearing on the merits of the constitutionality of the state takeover statutes was held before Judge Hill. At the opening of that hearing, the New York officials advised the court and GWU that New York had decided not to assert jurisdiction over the tender offer. Although the attorneys for the New York defendant participated in the hearing, the court ultimately determined that GWU's case against New York was moot.

On September 6, 1977, the District Court entered Judgment declaring unconstitutional and restraining the enforcement of the Idaho Takeover Statute insofar as it purported to apply to GWU's proposed cash tender offer for the purchase of the securities of Sunshine. Specifically, the court found that as applied in the instant case the Idaho Takeover Statute represented an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the federal Constitution and intruded without justification into an area preempted by federal securities laws in violation of the Supremacy Clause. The Judgment was stayed by the District Court through September 16, 1977, to enable the Defendants to file an application for a stay of the Judgment with the Circuit Court and to enable that court to consider whether to grant a further stay of the Judgment pending a ruling on the Defendants' application. On September 16, 1977, the Fifth Circuit entered its Order denying a stay of the trial court's judgment.

On August 10, 1978, the Fifth Circuit entered its decision affirming the judgment of the trial court. Specificially, the

Fifth Circuit held (a) the district court had subject matter jurisdiction of the controversy, (b) the district court had personal jurisdiction of the defendants by application of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), (c) the Texas long arm statute[4] constitutionally authorized assertion of personal jurisdiction over the nonresident defendants, (d) section 27 of the Securities Exchange Act of 1934 provided an independent source of personal jurisdiction over the defendant Idaho officials, (e) venue in the Northern District of Texas was proper under both §27 of the Securities and Exchange Act of 1934 and 28 U.S.C. §1391(b), the applicable general venue statute, (f) the Idaho Takeover Statute is preempted by federal securities laws and (g) the Idaho Takeover Statute is invalid under the commerce clause, U.S. CONST. art. I §8.

The resolution of the issues by the Fifth Circuit Court of Appeals conformed to constitutional standards and to the applicable pronouncements of this Court. The decision of that court is correct and no further argument or review is warranted.

ARGUMENT

The courts below applied traditional principles of personal jurisdiction in a unique, but not difficult, setting. Unlike any other state statutes, state takeover acts, of which the Idaho act is typical, *intentionally* affect and even prohibit commerce not only among, but within other states.[5]

[4] TEX. REX. CIV. STAT. ANN. art. 2031b (Vernon).

[5] Counsel for Director McEldowney advised the District Court on the record that he was seeking to apply the provisions of the Idaho Act extraterritorially, so as to prohibit GWU's proposed tender offer from going forward in any State until and unless the requirements of the Idaho Act were satisfied.

The Sunshine stock which GWU was attempting to acquire in the course of its proposed case tender offer was widely held and regularly traded on national securities markets.[6] However, had the Idaho Statute not been declared unconstitutional and unenforceable by the District Court, GWU could have made its offer *nowhere* in the world until it had complied with the Idaho Takeover Statute. The commencement of GWU's tender offer was delayed for 5 months after the Idaho Department of Finance determined to take jurisdiction of GWU's proposed cash tender offer. GWU's offer was made to Sunshine shareholders only after entry of the District Court's judgment that Idaho's Takeover Statute is unconstitutional and unenforceable and subsequent to the Circuit Court's order of September 16, 1977, refusing to stay that judgment pending appeal.[7] By his application of the Idaho Act, Appellant McEldowney, for a substantial period of time, denied the right of residents of states other than Idaho, including Texas, to determine whether they wished to accept GWU's cash offer. McEldowney, while asserting this extraordinary power over the commerce of other states would deny to courts sitting in those other states the right to pass on the legality of the exercise of such extraterritorial regulation.

Under the teachings of this Court, Idaho may not refuse to recognize the territorial limits of its legislative

[6] Sunshine stock is traded on the New York and Spokane Stock Exchanges.

[7] It should be brought to the Court's attention that the tender offer expired October 5, 1977. The shares of Sunshine acquired through the offer were transferred to Western Investment Company ("Western"), a GWU subsidiary, on April 20, 1978. On October 4, 1977 GWU, Sunshine and Hunt International Resources Corporation ("HIRCO") entered an agreement whereby GWU and HIRCO would propose some form of reorganization with Sunshine. Discussions, as well as litigation relative to this reorganization are currently taking place.

authority. Legislative enactments can have binding effect only within the territorial confines of the jurisdiction passing the law *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 202 U.S. 143 (1934); *Hilton v. Guyot*, 159 U.S. 113 (1894).

The courts below were not asked to determine the manner in which the State of Idaho may permissibly govern its internal affairs. Those courts were called upon only to determine whether the Idaho statute could be applied to govern and halt commerce within the State of Texas and throughout the nation.[8] The courts below correctly held it could not, particularly where GWU is neither incorporated nor licensed to do business in Idaho, Sunshine is not incorporated in Idaho, and the Idaho statute does not require the presence in Idaho of any Sunshine shareholder.

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[8] Judge Wisdom stated in his opinion for the Fifth Circuit in this case:

> Idaho Code §30-1530(1) states, in part that "It is unlawful for any person to make a take-over involving a target company in this state or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the director". As interpreted by the Idaho Department of Finance, this provision would prevent Great Western from making a tender offer to anyone in the world if it did not comply with the Idaho statute.

577 F. 2d at 1263. Similarly, the district judge concluded that:

> Officials of Idaho . . . give extraterritorial effect to their takeover statute[] by forbidding tender offerors under their jurisdiction from making any offer to residents of another state which is not made to residents of Idaho. . . . Idaho Code §30-1506. . . . .

Judge Hill's Findings of Facts and Conclusions of Law filed April 21, 1977 at 6. Section 30-1506 provides in pertinent part:

> LIMITATIONS ON OFFERORS. — (1) No offeror may make a takeover offer involving a target company which is not made to all its stockholders in this state, or which is not made to stockholders outside this state.

THE DOCTRINE OF EX PARTE YOUNG WAS PROPERLY APPLIED BY THE COURTS BELOW

This Court established in *Ex Parte Young*, 209 U.S. 123 (1908) that a suit by an aggrieved person to restrain a state official from enforcing an allegedly unconstitutional state statute is a suit against the state official in his individual capacity and is therefore not barred by the Eleventh Amendment. As noted by the Fifth Circuit in this case, this Court has recently refused to overrule or restrict that decision. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-157 n. 6 (1978). It has consistently been reaffirmed over the seventy years of *Ex Parte Young's* existence that the Eleventh Amendment does not prohibit claims for declaratory and prospective injunctive relief against state officials who seek to enforce unconstitutional state statutes. *See e.g., Edelman v. Jordan*, 415 U.S. 651 (1974). GWU in its suit against Appellants sought nothing other than declaratory and injunctive relief against the prospective enforcement against it of the Idaho Takeover Statute.

McEldowney's argument that *Ex Parte Young* permits a state official to be sued only in federal courts located in the state where the official holds office[9] is without support and was seriously undercut by the concurring opinions of four members of this Court in *California v. Texas*, ... U.S. ....., 98 S. Ct. 3107 (1978). The necessary import of those opinions, suggesting the availability of a federal interpleader action where an estate is potentially subject to the taxing authority of more than one state, is that a federal forum exists wherein personal jurisdiction of the taxing officials of both Texas and California is proper. The officials of at least one state must defend the action in a federal district

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[9] Appellant's Jurisdictional Statement at 12-13.

court outside the state in which they hold office. The *power* to compel a state official to defend a suit against him outside his home state exists. The Fifth Circuit applied the doctrine of *Ex Parte Young* as its progeny dictates, accurately concluding that:

> We read *Young* to say that a state official enforcing an unconstitutional statute is an individual defendant and nothing more. Under the reasoning of *Ex Parte Young*, the state has no interest in the lawsuit, for it is incapable of authorizing an unconstitutional act.[10]

Thus, the remaining and conventional inquiry is whether the non-resident official has sufficient contacts with the forum to support its assertion of personal jurisdiction.

As the Fifth Circuit explained, the propriety of personal jurisdiction in Texas in this suit was a function of Idaho's regulatory activities, not a failure by the trial court to properly understand and apply the teachings of *Ex Parte Young*.

> The dearth of previous cases where a state official has been sued outside his home state is probably attributable to the states having rarely, if ever, enacted statutes similar to the Idaho takeover law (and most other state takeover laws) that purport to extend a local official's regulatory jurisdiction to other states.

577 F. 2d at 1266.

PERSONAL JURISDICTION AND VENUE WERE PROPER UNDER THE TEXAS LONG ARM STATUTE

The Texas Long Arm Statute authorizes the assertion of personal jurisdiction over non-residents to the limits of due process. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.

[10] 577 F. 2d at 1265.

2d 760 (Tex. 1977). Thus, the Fifth Circuit properly perceived the issue presented to it:

> The question is whether due process permits a court in Texas to exercise jurisdiction over the Idaho official who has enforced the Idaho takeover law to prevent a Texas-based corporation from proceeding with a national tender offer.

577 F. 2d at 1266.

Lower federal courts and state courts have uniformly considered it possible to satisfy the "minimum contacts" requirement of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) by showing that a defendant engaged in activity outside the forum state which caused reasonably foreseeable consequences within the state. See, e.g., *State ex rel Sperandio v. Clymer*, 568 S.W. 2d 935 (Mo. 1978); *Black v. Acme Markets, Inc.*, 564 F. 2d 681 (5th Cir. 1977); and cases cited in the Fifth Circuit's opinion, 577 F. 2d at 1266. Director McEldowney's assertion that this Court has rejected such an "effects" test is not supported by *Kulko v. Superior Court*, 436 U.S. 84, (1978). In the words of Judge Wisdom:

> *Kulko* does not hold that a court considering an *International Shoe* question may not look to effects within the forum unless the defendant's effect-producing activity causes physical injury within the forum state or affects the defendant's commercial transactions within the forum state. Justice Marshall discussed these factors to support his conclusion that the effect in *Kulko* could not support personal jurisdiction in California. He did not establish new general restrictions on the use of the effects test in the application of *International Shoe*.

577 F. 2d at 1267.

The various aspects of the minimum contacts test (i.e., whether the defendant is "doing business" in the forum,

whether he has undertaken "purposeful activity" in the forum and whether he has purposefully availed himself of the benefits and protections of the forum's laws) are merely aids in determining whether contacts with the forum are sufficient to support a constitutional assertion of personal jurisdiction. Thus, the trial court concluded that "'[d]oing business' under [the Texas long arm statute] includes all acts or omissions which subject the defendant to the exercise of jurisdiction by Texas courts; the terminology has no commercial import." District Court's Findings and Conclusions at 6. Both courts below, after examining what was essentially a fact question, held that the test for obtaining personal juridiction of a non-resident defendant as announced by this Court was met. "The activities of the defendant officials were to regulate tender offers. The impact of their regulation was felt in Texas, as they intended it to be. Thus, they did conduct activities in Texas."[12] 577 F. 2d at 1269.

Personal jurisdiction over Director McEldowney was also proper under section 27 of the Securities and Exchange Act

[12] Discussing the effects within Texas of the Appellants' actions, the Circuit Court noted:

> When the Idaho officials, through the Idaho Takeover Statute, asserted jurisdiction over the Great Western offer for Sunshine, they foreseeably caused efforts in Texas to comply with the Idaho state law. When the Idaho officials summarily delayed the effectiveness of Great Western's tender offer for Sunshine, they foreseeably restrained a corporation in Dallas from proceeding with its plans. In other words, the Idaho officials regulated a corporation that acts in the Northern District of Texas and through that regulation foreseeably changed the corporation's actions. These effects — effects with substantial consequences on important business plans — are more than sufficient to satisfy the minimum contacts requirement.

577 F. 2d at 1267.

of 1934.[13] Section 28 of that Act, as the Court of Appeals determined, ". . . essentially restates the supremacy cause, making it a statutory as well as a constitutional requirement." 577 F. 2d at 1271. Section 28 thus imposes upon the states a duty not to enact or enforce laws that conflict with the Securities and Exchange Act. As the courts below held, breach of this duty subjects state officials to the jurisdiction and venue provisions of §27.

Venue, as well as personal jurisdiction was supported by §27. The Court of Appeals concluded:

> Venue is proper in any district where acts constituting part of the alleged violation of the 1934 Act occurred. The alleged violation consists of enforcing an invalid statute. The regulatory activities by the Idaho officials had their restraining effect at the corporate headquarters of Great Western in Dallas. This was a sufficient act to make venue proper in the Northern District of Texas.

577 F. 2d at 1272.

Venue in the Northern District of Texas was also proper under the applicable general venue statute, 28 U.S.C. §1391

[13] 15 U.S.C. §78aa (1970). That section provides in pertinent part:

> Any criminal proceeding [under the Act] may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

(b).[15] Acknowledging that this statute can be read to provide venue in only one district, Judge Wisdom observed "Commentators have recognized. . . that a preferable approach would be to equate the availability of compulsory process on a non-resident and proper venue under §1391."[16] However, whether a narrow or expansive reading of §1391 is followed venue was proper for "If there is a single place where the allegedly invalid restraint occurred, that place is Dallas." 577 F. 2d at 1273.

The propriety of venue in the Northern District of Texas is underscored by the posture of this case as originally brought. Officials of New York and Maryland, as well as Idaho, indicated they would assert juridiction over GWU's offer.[17] Had all three states asserted jurisdiction there would have been no district in which all defendants resided. Only in the Northern District of Texas, the focal point of the regulatory activity, could the entire controversy be tried in a single suit.[18]

Appellant protests that the resolution of the personal jurisdiction and venue issues by the courts below will subject state officials to a multitude of suits in federal courts in distant states. This overlooks the unique nature of the statute he seeks to enforce. It is only when officials of one state purport to govern affairs in another state that they may be subjected to the jurisdiction of the courts of that other

[15] That statute provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

[16] 577 F. 2d at 1273. 1 J. MOORE, FEDERAL PRACTICE ¶0.142 [5.-2] at 1430 and 15 C. WRIGHT et al., FEDERAL PRACTICE & PROCEDURE: JURISDICTION §3806 at 29.

[17] See, *supra* at 4.

[18] See, 577 F. 2d at 1273-1274.

state. The real threat to principles of federalism presented by this case is not the effect on state officials of the assertion of personal jurisdiction. Rather, the threat is to the soverignty of all states if jurisdiction is denied in a case such as this where a state purports to supplant the authority of Congress and attempts to legislate for the entire nation.[19]

THE PREEMPTION ISSUE WAS CORRECTLY DECIDED

When congressional legislation conflicts, either expressly or implicitly, with state legislation, the latter is inoperative. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942). The preemption doctrine dictates that state legislation is an unconstitutional infringement on federal supremacy if: (1) Congress intended to displace state regulation or "the scheme of the federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); (2) the subject affected necessitates a uniform system of regulation, *California v. Zook*, 336 U.S. 725, 728 (1949); or (3) the state staute conflicts with the federal regulatory scheme. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231-36 (1947).

A state statute "conflicts" with the federal law when it frustrates the realization of the goals Congress sought to achieve. The state statute need not make compliance with applicable federal law impossible. This Court has recently stated:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical im-

[19] See, 577 F. 2d at 1269-70.

> possibility. . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 10 L Ed 2d 248, 83 S Ct 1210 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L Ed 581, 61 S Ct 399 (1941); *Jones v. Rath Packing Co.*, [430 U.S.] at 526, 540-541, 51 L Ed 2d 604, 97 S Ct 1305. Accord, *De Canas v. Bica*, 424 U.S. 351, 363, 47 L Ed 2d 43, 96 S Ct 933 (1976).

Ray v. Atlantic Richfield Co., 435 U.S. at 158 (1978). Applying this test the Court of Appeals properly held in this case that ". . . the particular takeover law before us cannot stand because it conflicts with the federal statute. In the words of *Hines*, 'it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 577 F. 2d at 1275.[20]

It is unnecessary in demonstrating that a state statute has been preempted to find a specific congressional expression of preemption or even to find that a particular state requirement is totally inconsistent with federal law. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). "Conflict" should be construed in its "broadest sense" where, as in this case, there is "conflict with a complex and interrelated federal scheme of law, remedy, and administration." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

This Court has held that Congress, recognizing that tender offers serve important economic functions, adopted a policy of absolute "evenhandedness" dictating that neither the

[20] Commentators have also concluded that state takeover statutes are invalid under the Supremacy Clause. See *e.g., Langevoort, State Tender Offer Legislation: Interests, Effects and Political Competency*, 62 CORNELL L. REV. 213 (1977); Note, *State Takeover Statutes Versus Congressional Intent: Preempting the Maze*, 5 HOFSTRA L. REV. 857 (1977).

target company nor the offeror would be favored. "Congress was indeed committed to a policy of neutrality in contests for [corporate] control. . ." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977). The beneficiaries of the Williams Act were the shareholders who could best be served by a policy of strict neutrality which gave advantage to neither the incumbent management of the target company nor the offeror. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975).

The Williams Act reflects a congressional policy to regulate, not eliminate, tender offers.[21] The evenhanded regulation which is the hallmark of the Williams Act is destroyed by the Idaho Takeover Statute in multiple ways, including: (1) advance notification and prefiling requirements imposed by the Idaho Takeover Statute delay the commencement of an offer to the benefit of the target company; (2) the Idaho Act gives the target company the ability to delay further the commencement of an offer by insisting on a hearing; (3) Idaho's regulation of defensive efforts by a target is significantly weaker than Idaho's regulation of the offeror's activities, and (4) the Idaho statute gives the target company board the power to exclude an offer from state regulation by approving the offer. 577 F. 2d at 1278.

Delay in the commencement of a tender offer destroys the balance struck by Congress and gives incumbent management ample time to take action to defeat a tender offer.

> Congress recognized that delay can seriously impede a tender offer. . . It rejected legal requirements, such as

[21] H. R. Rep. No. 1171, 90th Cong., 2d Sess. 4 (1968); see *e.g. Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 114-19, 136-139, 165-75.*

> pre-commencement review by the SEC, that could delay offers unnecessarily. Such delay could prevent the offeror from fairly presenting its case.

577 F. 2d at 1277. While there is no specific waiting period required by the Idaho Act, an offer may not commence until approved by a state official and the target company may also delay the commencement of an offer by requesting a hearing which must be granted. Idaho Code §§30-1503(2), (4) and (5). During the waiting period, while the offer hangs in limbo, incumbent management is free to recommend a competing tender offer or seek a defensive merger.

The waiting periods imposed by the provisions of the Idaho statute stand in sharp contrast to the provisions of the Williams Act which require no waiting period for the commencement of a lawful offer. In fact, Congress considered and rejected various prefiling clearance provisions. Prior to the adoption of the Williams Act, a bill had been introduced in 1965[22] which would have required an offeror to give twenty days' advance notice to the target corporation and the SEC of its intent to make a tender offer. That bill never got out of committee. The SEC opposed the bill because, as then-SEC chairman Manuel F. Cohen said, "we believe this might give management an unwarranted advantage when the offer is opposed." Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 THE BUSINESS LAWYER, 149, 153. The SEC suggested a seven day waiting period, but that was likewise rejected by Congress. *Id.*

If additional evidence of Congressional intent is required, it is found in the legislative history of the recently passed Hart-Scott-Rodino Antitrust Improvements Act of 1976. That enactment, designed to provide for administrative review of the antitrust implications of certain corporate amal-

[22] S. 2731, 89th Cong., 1st Sess. (1965)

gamations necessitated Congress' reexamination of its attitude toward tender offers as expressed in the Williams Act. While Congress provided for a thirty (30) day waiting period prior to the consummation of any mergers, it enacted only a fifteen (15) day waiting period (and that following the actual making of the offer) in the case of cash tender offers.[23]

Congress may soon have the opportunity to address conclusively the issue of federal preemption of state takeover statutes. A proposed Federal Securities Code, approved by the American Law Institute in May 1978, is to be introduced in Congress next year. Section 1904(c) of the Proposed Official Draft of the Code would specifically preempt state takeover acts except where the target company has its principal place of business in the regulating state and more than 50 percent of the target company shareholders holding more than 50 percent of the outstanding voting securities reside there.

Where Congress expressly rejects a specific form of regulation, such rejection is as sufficient to preempt a state statute that adopts the course rejected as is affirmative enactment of federal legislation that conflicts with the state legislation. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1917). Assuming the purpose of the Idaho Act was to protect investors and not to provide incumbent management with an arsenal of weapons to defeat tender offers, the entire approach to investor protection taken by Idaho is in conflict with that adopted by Congress in the Williams Act. Under the Williams Act the investor is fully informed and *he* chooses whether to accept an offer. Under the Idaho Act the choice is, in large part, made for him by incumbent manage-

[23] *See*, H. R. Rep. No. 94-1373, 94th Cong., 2nd Sess., at 12 (1976). And see the Court of Appeals decision at 577 F. 2d 1277-1278.

ment. Judge Wisdom explained the fundamental incompatibility of these approaches:

> Essentially, Congress relied upon a "market approach" to investor protection. The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.
>
> * * *
>
> We need not probe the minds of Idaho legislators to determine whether the true purpose of the Idaho takeover law was to protect investors or to protect incumbent management. Even if we accept the appellant's interpretation of the legislature's purpose, it is still true that Idaho chose to protect investors differently from the way Congress protected investors. Instead of relying upon *investors'* decisions after full disclosure, Idaho relies upon the business judgment of corporate directors with a fiduciary duty to their shareholders. Idaho's "fiduciary approach" to investor protection may be one way to protect shareholders, but it is an approach Congress rejected.
>
> Idaho's statute is preempted, because the market approach to investor protection adopted by Congress and the fiduciary approach adopted by Idaho are incompatible.
>
> * * *
>
> Congress intended for the investor to evaluate a tender offer; Idaho asks the target company management to make that decision on behalf of the shareholders.

577 F. 2d at 1276, 1279.

Congressional rejection of advance notification and prefiling requirements was part of a cohesive and well-balanced regulatory scheme to assure maximum benefits to shareholders and minimum disruption of market transactions. By avoiding advance notice and delay provisions, which the Idaho Takeover Statute adopted, Congress sought to preserve the tender offer as a means of effectuating a change in corporate control. Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1146 (1974).

The Idaho Takeover Statute requires of an offeror substantially more disclosure than the Williams Act. These burdensome disclosure requirements do not supplement the protection afforded investors by the Williams Act. They interfere with the federal regulatory scheme.

The disclosure mandated by the Idaho Act is similar to that included in a Form S-1 Registration Statement required by the Securities Act of 1933. *See* Idaho Code §30-1502(2). The results are that management of the target company can delay an offer by challenging the sufficiency of the offeror's disclosures and investors are buried beneath an avalanche of confusing and irrelevant information.[24] The Williams Act, on the other hand, requires disclosure of only that information Congress and the SEC deemed necessary and relevant.[25]

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[24] As Judge Wisdom summarized the effects of the disclosure requirements of the Idaho Act:

> Superficially Idaho's extensive disclosure requirements appear compatible with a market approach to tender offer investor protection. In reality, in the area of financial disclosure it can be true that "less is more". Disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures. . . . Management may also be able to halt an offer because some immaterial information required by excessive disclosure standards is missing or inaccurate. . . . Those excessive requirements would cut off an offeror's opportunity to present the material information that investors need to make their decisions.

577 F. 2d at 1280.

[25] *See, Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong.* 1st Sess. at 205. (Comments of Manuel F. Cohen, then chairman of the SEC).

Not only did Congress thoroughly investigate the matter of disclosure, but the SEC has recently reconsidered the amount of disclosure which should be required by an offeror. The Commission adopted, effective Augut 31, 1977, a new Tender Offer Statement on Schedule 14 D-1 and has also adopted the amendments of existing Rule 14 D-1 and the Acquisition Statement on Schedule 13D. The effect of these actions is to require the disclosure of certain information regarding the offeror's source of funds, its plans or proposals and past negotiations or transactions with the subject company. The new schedule would require the disclosure of certain financial information and pending legal proceedings relating to the tender offer if such information is material to an investment decision by a security holder. This action represents a studied attempt to provide *meaningful* disclosure to shareholders and preserve the congressional policy of evenhandedness.

Unlike the Williams Act, the Idaho statute requires excessive information which gives target company management too strong a weapon to block offers. Contrary to congressional policy, these additional requirements tip the balance of regulation in favor of incumbent management and serve no purpose except delay and obstruction. The disclosure of this additional information can hardly be essential because none of it need be disclosed to shareholders when the management of the target company approves the offer. As the Fifth Circuit concluded in this case:

> . . . Idaho's additions to the federal disclosure requirements reduce the utility of federally required disclosure and produce an obstacle to the accomplishment of the federal objective to enable investors to make an informed choice about a tender offer.

577 F. 2d at 1281.

Federal law preempts a state statute whenever a scheme of regulation, created by federal legislation and implemented by a federal administrative agency charged with responsibility for enforcing the regulatory scheme, is so pervasive that no room has been left for state law to provide supplemental regulation. *Ray v. Atlantic Richfield Co., supra; Rice v. Santa Fe Elevator Corp., supra.*

Where the federal government has reached a balance which satisfies the "needs of the subject matter without disproportionate burden on the regulatees, the balance struck is not to be upset by the imposition of higher local standards." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 171 (1963) (White, J. Dissenting). Thus, the Supremacy Clause forbade efforts by a state to afford patent protection to that which Congress had deemed unworthy of protection because the state efforts "disturbed the careful balance" which Congress had drawn. *Goldstein v. California*, 412 U.S. 546, 569-70 (1973).

The Williams Act provides the offeror and incumbent management of the target company with equal opportunity to present their cases to the shareholders, who will then be able to make a fully informed choice. The Idaho statute disturbs this careful balance. This Court has declared that "just as a state cannot encroach upon the federal . . . law directly, it cannot give protection of a kind that clashes with the objectives of the federal law." *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964). In view of the pervasive federal regulation of interstate cash tender offers, congressional action has preempted any state regulation of the field.

Whenever federal law regulates a field in which the federal interest is dominant, the federal system necessarily pre-

cludes enforcement of state laws on the same subject. *Ray v. Atlantic Richfield Co., supra; Hines v. Davidowitz,* 312 U.S. 52 (1941). The necessity of a unform system of regulation of a subject implies a congressional intent to preempt state regulation in that field. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973); *California v. Zook*, 336 U.S. 725 (1949).

Interstate tender offers require a uniform system of national regulation because non-uniform, arbitrary protection of incumbent management precludes effective functioning of the national securities markets. *Hearings on Corporate Takeovers Before the Senate Comm. on Banking, Housing and Urban Affairs*, 49th Cong., 2d Sess. 101 (1976) (statement by Richard A. Debs, Federal Reserve Bank, New York.). "[T]ender offers are frequently a matter of national concern and the issues they present call for resolution on a national scale". *Id.* at 91 (comment of SEC Commissioner Phillip Loomis).

Thirty-two states currently have takeover statutes. This proliferation has increased the probability of inconsistent requirements among the state statutes. It has also increased the liklihood that more than one state will assert jurisdiction over an interstate offer. Regardless of which states ultimately decide to take jurisdiction, offerors will be faced with the possibility of hearings in more than one state and the potential of inconsistent determinations regarding the legality of their offers. This problem was presented in this case when state officials of Idaho, New York and Maryland threatened, considered or actually asserted purisdiction over GWU's offer.

The inability of the Idaho Legislature to effectively regulate tender offers without causing nationwide repercussions

demonstrates the necessity of a single, uniform federal scheme of regulation.

THE INTERSTATE COMMERCE ISSUE WAS CORRECTLY DECIDED

Both courts below held that the Idaho Takeover Statute impermissibly burdens interstate commerce. To reach this determination each court accurately applied the test enunicated by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a case Judge Wisdom referred to as "a restatement and distillation" of cases construing the commerce clause.[26]

As previously illustrated,[27] the Idaho statute effectively protects incumbent management of the target company. The act is designed to protect local industry in a way forbidden by *Pike*. As the Court of Appeals noted, if the purpose of the act is to prevent the removal of local business to other

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[26] Writing for a unanimous Court in *Pike*, Justice Stewart declared:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . if a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

[27] *Supra* at 19 et. seq.

states that purpose is insufficient to protect the statute from a commerce clause attack.[28]

It is also difficult to accept that the Idaho law represents an effort to protect local shareholders because its provisions apply even to offers where no shareholder resides in Idaho. The effects of the Idaho legislation are to discourage the making and commencement of tender offers and disrupt national securities markets.[29]

A statute with extraterritorial impact, which can and did preclude the commencement of a tender offer in every part of the nation, places a great burden of delay and inconvenience on potential offerors. A state's regulation is also of doubtful validity under the Commerce Clause where it necessarily extends far beyond that state's boundaries, since:

> To the extent that the burden of state regulation falls on interests outside the state it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 767-68 n2 (1945); *see also, Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1974).

Any local benefits derived from regulation of tender offers that take place outside of Idaho between nonresident investors do not justify the severe burdens upon interstate commerce imposed by the Idaho statute. That law denies an out-of-state offeror the right to purchase securities without

[28] 577 F. 2d at 1282; and see Note, *Commerce Clause Limitations Upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1159 (1974).

[29] *See*, 577 F. 2d at 1283 and authorities cited therein.

compliance with the Idaho statute even though the offer is made to shareholders not residing in Idaho. The state statute thus imposes an excessive burden on interstate commerce which is not justified by any legitimate local interest.

The Idaho statute, standing alone, impermissibly burdens interstate commerce. This burden is multiplied by the proliferation of state takeover statutes.[30]

> . . . the state tender offer statutes as a class significantly and unjustifiably interfere with a free flow of interstate commerce in order to benefit purely local interests, and are an unfortunate step backward in the orderly development of the federal securities laws.

E. Aranow et al., DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL (1977) at 233.

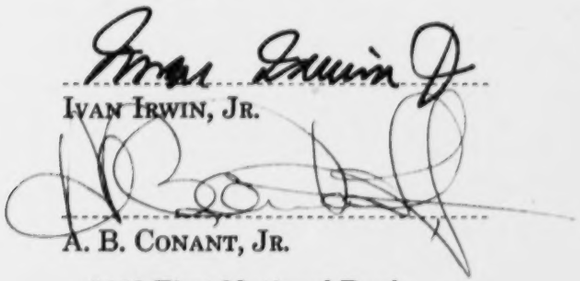
The benefits provided target company shareholders by the Idaho statute are, at best, uncertain. Yet that law can restrict interstate commerce regardless of the residence of these shareholders. As the Fifth Circuit, in agreement with the district court, concluded, "Idaho's extraterritorial regulation of tender offers interferes with securities transactions all over the country. In this case, Idaho's law halted over 31 million dollars of interstate commerce." 577 F. 2d at 1286. On balance, the ". . . burdens [on interstate commerce] are disproportionate to the legitimate benefits the Idaho takeover law provides." *Id.*

[30] *Supra* at 26.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be summarily affirmed on the grounds that the resolution of the issues was eminently correct and the questions presented by this appeal do not warrant further argument or review.

Respectfully submitted,



IVAN IRWIN, JR.

A. B. CONANT, JR.

3100 First National Bank
Building,
Dallas, Texas 75202,
(214) 748-9696

Attorneys for Appellee.

Of Counsel:

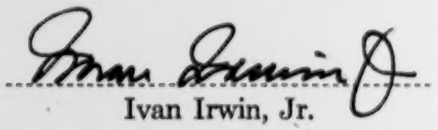
SHANK, IRWIN, CONANT,
WILLIAMSON & GREVELLE
3100 First National Bank
Building
Dallas, Texas 75202
(214) 748-9696

James Wm. Moore
Yale University
New Haven, Connecticut

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Affirm was mailed, first class mail, postage pre-paid on this the 8th day of December 1978, to the following counsel of record for Appellant:

Peter E. Heiser, Jr.
Special Deputy Attorney General
of Idaho
4060 212th Way S.E.
Issaquah, Washington 98027



Ivan Irwin, Jr.